



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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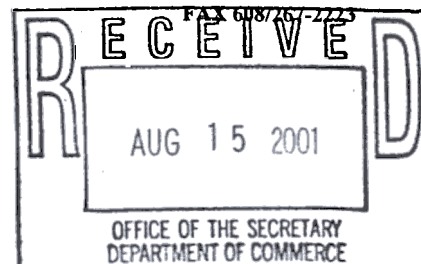
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August 14, 2001

Ms. Brenda J. Blanchard, Secretary
Wisconsin Department of Commerce
P.O. Box 7970
Madison, Wisconsin 53707-7970



Re *Legal Validity and Enforceability of Guarantees and Surety Bonds*

Dear Secretary Blanchard

Administrator Matthew Frank asked me to respond to your request for a written opinion regarding the legal validity and enforceability of the guarantee and the surety bond in the form and executed as described in Wis. Admin. Code §§ Comm 10.822 and 10.826.

Your request arises under subchapter VIII of Wis. Admin. Code ch. Comm 10. The regulations require that owners or operators of petroleum underground storage tanks demonstrate financial responsibility for taking corrective action and compensating third-parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum underground storage tanks. *See* Wis. Admin. Code § Comm 10.816. As you note, an owner or operator may use a guarantee or surety bond to establish financial responsibility only if the Attorney General has submitted a written statement that a guarantee or surety bond executed as described is a legally valid and enforceable obligation in this state. *See* Wis. Admin. Code § Comm 10.818(2).

We have reviewed the form of the guarantee and surety bond set forth in Wis. Admin. Code §§ Comm 10.822 and 10.826 respectively. Both the guarantee and surety bond appear to be valid and enforceable obligations in this state as long as they conform to the general requirements regarding execution and consideration discussed below.

Under Wisconsin law, a guaranty is a contract "to answer for the debt, default, or miscarriage of another." *See Klein-Dickert Oshkosh v. Frontier Mortgage Corp.*, 93 Wis. 2d 660, 668, 287 N.W.2d 742 (1980); *see also Harris v. Metropolitan Mall*, 112 Wis. 2d 487, 503, 334 N.W.2d 519 (1983). Similarly, a surety bond constitutes a contract to pay the debt of another. *See Bell Captain North v. Anderson*, 112 Wis. 2d 396, 402-03, 332 N.W.2d 860 (Ct. App. 1983). Guarantees and surety bonds, like other contracts, must be made for valuable consideration in order to be enforceable. *Estate of Mingesz*, 70 Wis. 2d 734, 739-40, 235

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N.W.2d 296 (1975); *see also London & Lancashire Indemnity Co. v. Allen*, 272 Wis. 75, 79, 74 N.W.2d 793 (1956).

In addition, the agreement, including a statement of consideration, must be expressed in writing and subscribed by the party charged with performance of the contract. Section 241.02(1) of the Wisconsin Statutes provides in relevant part as follows:

In the following case every agreement shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith:

(b) Every special promise to answer for the debt, default or miscarriage of another person.

Wis. Stat. § 241.02(1)(b). Including the words “for value received” in the guarantee or surety bond as executed satisfies the writing requirement and raises a rebuttal presumption that consideration was in fact given. *See Estate of Mingesz*, 70 Wis. 2d at 739.

Because guarantees and surety bonds constitute promises to pay the debt of another, they are subject to the writing requirement under Wis. Stat. § 241.02(1)(b). *See Jacobi v. Cielinski*, 262 Wis. 100, 102-03, 53 N.W.2d 718 (1952). We note, however, that no consideration is recited in the guarantee and surety bond specified in Wis. Admin. Code §§ Comm 10.822 and 10.826. Some language such as “for value received” needs to be included in the guarantee and surety bond mechanisms.

Finally, any individuals signing on behalf of a guarantor firm or surety company must be authorized to bind the firm or company involved. Assuming this execution requirement is met, and assuming compliance with the above consideration requirements, it is our opinion that the guarantee and surety bond mechanisms specified in Wis. Admin. Code §§ Comm 10.822 and 10.826 would be legally valid and enforceable obligations in the state of Wisconsin for purposes of establishing financial responsibility of owners and operators of underground storage tanks containing petroleum.

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If you have any further questions, please let us know.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra L. Tarver".

Sandra L. Tarver
Assistant Attorney General

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